UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

THOMAS HUFFSTUTLER,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 01-98-B***
	)	
LARRY G. MASSANARI,	***)***	
Acting Commissioner of Social Security,[1]	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[2]

This Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal raises the issue whether substantial evidence supports the commissioner's determination that, for purposes of SSD, the plaintiff did not suffer from a severe impairment as of his date last insured, and for purposes of SSI, he was capable of making an adjustment to work existing in significant numbers in the national economy. I recommend that the decision of the commissioner be vacated and remanded for further proceedings with respect to both SSD and SSI.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the

[1] Pursuant to Fed. R. Civ. P. 25(d)(1), Acting Commissioner of Social Security Larry G. Massanari is substituted as the defendant in this matter.

[2] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on November 20, 2001, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

administrative law judge found, in relevant part, that the plaintiff acquired sufficient quarters of coverage for purposes of SSD to remain insured through June 30, 1996, Finding 1, Record at 28; that he had cervical disc disease, an impairment that was severe but did not meet or equal those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), Finding 3, *id*.; that his statements concerning his impairment and its impact on his ability to work were not entirely persuasive in light of discrepancies between his assertions and information contained in the documentary reports, Finding 4, *id*.; that he retained the residual functional capacity to perform a range of "light" work on a sustained basis, Finding 5, *id*.; that he was unable to perform his past relevant work as a truck driver, Finding 6, *id*.; that his capacity for the full range of light work was diminished by limited upper-extremity use, inability to push or pull forcefully, limited reaching in all directions and inability to lift above shoulder level, Finding 7, *id*.; that, in view of his age (41 on January 15, 1991), education (at least high school), work experience (unskilled) and residual functional capacity, he was able to make a vocational adjustment to work existing in significant numbers in the national economy, Findings 8-11, *id*.; and that he had not been under a disability at any time through the date his insured status expired or at any time through the date of decision, Finding 12, *id*. at 29.[3] The Appeals Council declined to review the decision, *id*. at 7-8, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981; 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the

[3] Although not reflected in her Findings, Record at 28-29, the administrative law judge also determined that the plaintiff did not suffer
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conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

In the context of the SSD decision the administrative law judge reached Step 2 of the sequential evaluation process. Although a claimant bears the burden of proof at this step, it is a *de minimis* burden, designed to do no more than screen out groundless claims. *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1123 (1st Cir. 1986). When a claimant produces evidence of an impairment, the commissioner may make a determination of non-disability at Step 2 only when the medical evidence "establishes only a slight abnormality or combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered." *Id*. at 1124 (quoting Social Security Ruling 85-28).

In the context of the SSI decision the administrative law judge reached Step 5 of the sequential process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past relevant work. 20 C.F.R. § 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

The plaintiff complains that the administrative law judge erred in determining, for purposes of SSD, that his cervical degenerative disc disease did not constitute a severe impairment as of his date last insured, and in relying, for purposes of SSI, on a hypothetical question to a vocational expert that excluded mild depression and moderate pain. *See generally* Statement of Specific Errors ("Statement of Errors") (Docket No. 3). With respect to SSD, he seeks remand with instructions to continue the

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from a severe impairment prior to his date last insured of June 30, 1996, *id*. at 22.

sequential evaluation process; with respect to SSI, he seeks remand for further consideration. *Id.* at 4, 6. I agree that, on both counts, remand is warranted.

I. Discussion

A. SSD Finding at Step 2 (Non-Severity)

The plaintiff, a former truck driver, was driving his truck in 1990 when, per his testimony at hearing, "I started noticing numbness in my extremities, especially my arms, hands, pain across my shoulders coming out of my neck, radiating my – over my back and down my arms." Record at 40. After consulting several physicians, the plaintiff was diagnosed by 1991 (well before expiration of his insured status) as suffering from cervical degenerative disc disease with radiculopathy. *See, e.g.*, *id.* at 152 (March 7, 1991 note of Dennis L. Shubert, M.D., Ph.D.), 157-58 (August 27, 1991 note of Rodney A. Rozario, M.D.). One treating physician, Dr. Shubert, noted that "[t]his is a situation where [the plaintiff] could choose to ignore his symptoms presently and work to his tolerance. The other alternative is to undergo an anterior cervical discectomy and fusion for decompression of that nerve root in hopes that we can improve his neck pain and right arm pain." *Id*. at 152.

The plaintiff chose not to undergo surgery. He stopped driving trucks in January 1991, *id*. at 41, and, per his description at hearing, "I learned to tolerate [the pain] then. I guess when I stopped driving truck and stopped being pounded around all the time, the symptoms seemed to – I won't say disappear, but they alleviated some. And then just over the past, oh, I don't know, 4 or 5 years, it's gotten progressively worse," *id*. at 47.

Consistent with this description, Eric W. Metzler, M.D., the plaintiff's family practitioner, *id.* at 43, reported the plaintiff as indicating on December 20, 1993: "Is getting along okay. Has learned to live with his back pain. Continues to have some mild numbness in the fourth and fifth fingers of each hand, depending on what position he sleeps in. Also has continued discomfort in the right

shoulder muscles," *id*. at 175.[4] Dr. Metzler diagnosed "[c]hronic low back pain and right shoulder strain, stable." *Id*. In similar vein, on June 9, 1994 Dr. Metzler recorded the plaintiff as indicating: "Is getting along okay. Has intermittent low back pain." *Id*. at 224. The record contains no indication of further complaints of back pain until an acute episode for which the plaintiff sought emergency-room treatment in July 1997. *Id*. at 199, 202.

Against this backdrop, the administrative law judge concluded: "[T]here is no objective evidence that the claimant suffered from anatomical, physiological, or psychological abnormalities that could be documented by medically acceptable clinical and laboratory diagnostic techniques. Mr. Huffstutler did not receive medical treatment for his back or neck between 1993 and June 30, 1996. Therefore, [the] record does not support a finding that the claimant suffered from a severe impairment prior to the date last insured of June 30, 1996." *Id*. at 22. In so stating, the administrative law judge erred. There is uncontroverted objective medical evidence that the plaintiff was diagnosed by 1991 as suffering from cervical degenerative disc disease (and, in fact, the administrative law judge so found, *see id*. at 20). Simply because the symptoms eased and became tolerable when the plaintiff ceased truck driving does not mean that his condition was non-severe, for purposes of Step 2, as of his date last insured. *See, e.g.*, *McDonald*, 795 F.2d at 1125 ("If . . . evidence shows that the person cannot perform his or her past relevant work because of the unique features of that work, denial at the not severe stage is inappropriate.") (footnote and internal quotation marks omitted).[5] In addition, as the plaintiff points out, Statement of Errors at 4, both non-examining consultants rating the extent of his impairment as of his date last insured found him to be limited in various ways that accurately can be

[4] The plaintiff sought treatment from Dr. Metzler on September 27, 1993 for an "exacerbation of pain in the low back at the beltline" following activity raking and brush handling. Record at 176.

[5] It is unclear whether the lower back pain of which the plaintiff complained in 1993 was attributable to his cervical degenerative disc disease – the "cervical" area of the spine referring to the neck area, *see* Taber's Cyclopedic Medical Dictionary at 264 (14th ed. 1983) – however, that is immaterial to this disposition.

characterized as more than *de minimis* – for example, unable to do any overhead climbing or overhead work, Record at 231, 233-34 (Physical Residual Functional Capacity Assessment by Robert Hayes, D.O.), and unable to do any forceful pushing or pulling or lift above shoulder level, *id*. at 250-51, 253 (Physical Residual Functional Capacity Assessment by Lawrence P. Johnson, M.D.).[6]

The plaintiff accordingly is entitled to remand for continuation of the sequential evaluation process with respect to his condition as of June 30, 1996, his date last insured.

B. SSI Finding at Step 5 (Ability To Do Other Work)

The plaintiff next assails the administrative law judge's Step 5 SSI finding that he possessed sufficient residual functional capacity to transition to work available in significant numbers in the national economy. Statement of Errors at 5-6. In the plaintiff's view, this determination was built on a faulty foundation – namely, a hypothetical question to a vocational expert that omitted his pain and mild depression. *Id*.

The responses of a vocational expert are relevant only to the extent offered in response to hypotheticals that correspond to medical evidence of record. *Arocho v. Secretary of Health & Human Servs*., 670 F.2d 374, 375 (1st Cir. 1982). "To guarantee that correspondence, the Administrative Law Judge must both clarify the outputs (deciding what testimony will be credited and resolving ambiguities), and accurately transmit the clarified output to the expert in the form of assumptions." *Id*.

In this case, the administrative law judge relied on Dr. Johnson's March 2, 1998 physical residual functional capacity assessment, which she transmitted in the form of a hypothetical to vocational expert Sandra Gemmel. Record at 26, 58-60, 250-57. To the extent the administrative law judge discounted the plaintiff's claims of pain, choosing only to credit such limitations as were found

[6] Both Drs. Hayes and Johnson checked boxes indicating that their assessments pertained to the plaintiff's date last insured of June 30,
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in the Johnson report, I see no basis on which to disturb that determination. As she observed, the plaintiff was able to spend up to several hours a day at the computer and to complete an associate's degree in business, graduating in 1995 with a 3.8 cumulative average. *Id*. at 23-24. She also alluded to evidence that, to some extent, doctors were unable to correlate the plaintiff's claimed symptomatology with objective medical evidence. *Id*. at 23; *see also, e.g., id*. at 255, 268. "The credibility determination by the ALJ, who observed the claimant, evaluated his demeanor, and considered how that testimony fit in with the rest of the evidence, is entitled to deference, especially when supported by specific findings." *Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987).

I am nonetheless troubled by the administrative law judge's instruction to Gemmel to assume "[n]o mental" limitation, Record at 58, an assumption at odds with her own apparent finding that the plaintiff suffered from an affective disorder – "[o]ther adjustment disorder with mixed emotional features," *id*. at 30-31.[7] At oral argument, counsel for the commissioner suggested that the plaintiff's mental condition was so mild and so unlikely to impact on the demands of unskilled work that the administrative law judge properly could have screened it out of any hypothetical conveyed to the vocational expert. I disagree.

First, *Arocho* implies that it is the job of the administrative law judge to transmit an accurate picture of a claimant's physical and mental limitations to a vocational expert – not to pick and choose

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1996, as well as to his then-current status. Record at 231, 250.

[7] In the text of her decision, the administrative law judge stated that she was "in agreement with Disability Determination that the claimant does not exhibit mental limitations," Record at 26, and indeed she did not list any mental impairments among her Findings, *id*. at 28-29. To the extent the administrative law judge did determine that the plaintiff suffered from no mental impairment, I find that conclusion to be unsupported by substantial evidence of record. Only one source, non-examining consultant Peter G. Allen, Ph.D., suggested that there were "no mental issues – uses Valium for muscle relaxant." *Id*. at 239. However, that report was made on November 6, 1997, *id*., prior to examination of the plaintiff by consultant David W. Booth, Ph.D., on February 2, 1998, *id*. at 227-30. Dr. Booth diagnosed adjustment disorder with mixed emotional features and raised a question of possible somatization disorder. *Id*. at 230. Subsequent to the Booth report, non-examining consultant Brenda Sawyer, Ph.D., agreed that the plaintiff suffered from a non-severe adjustment disorder with mixed emotional features. *Id*. at 240-49. In addition, neurologist Edward David, M.D., assessed

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which ones merit presentation. Second, the work in issue was not unskilled, with Gemmel focusing on "business management related occupations" commensurate with the plaintiff's education (an associate's degree in business) and computer proficiency. Record at 59. Third, although the plaintiff's mental impairment was rated as so mild that it properly could be categorized as non-severe, *compare* Record at 31-32 *with* 20 C.F.R. §416.920a(d)(1), the commissioner's regulations and relevant First Circuit caselaw make clear that such impairments may not simply be brushed aside, *see, e.g.*, 20 C.F.R. § 416.945(e) ("When you have a severe impairment(s) . . . we will consider the limiting effects of all your impairment(s), even those that are not severe, in determining your residual functional capacity."); *McDonald*, 795 F.2d at 1127 ("It seems simply a matter of common sense that various physical, mental, and psychological defects, each non-severe in and of itself, might in combination, in some cases, make it impossible for a claimant to work."). Fourth, and finally, given Gemmel's testimony that adding moderate to moderately severe pain and mild depression to the mix offered by the administrative law judge would significantly impact a claimant's ability to work forty hours a week, Record at 60-62, one cannot be confident that the error in omitting any mention of a psychological impairment (however mild) was harmless.

The plaintiff accordingly is entitled to remand for further consideration of his SSI application not inconsistent herewith.

II. Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **VACATED** and the cause **REMANDED** with instructions to continue the sequential evaluation process with respect to the plaintiff's SSD application and for further consideration of the plaintiff's SSI application not inconsistent herewith.

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the plaintiff as having "mild depression" upon examination in May 1998. *Id.* at 262.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 26th day of November, 2001.

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David M. Cohen
United States Magistrate Judge